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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

MITCHELL ARMS, INC.,
Petitioner,
VS.
THE UNITED STATES,
Respondent.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals err in finding that Mitchell Arms had no protectable property interest in the import permit or in the property seized by Customs?

1. Does the holder of an unconditional import permit, who purchases property in reliance on the permit, have a right to bring his property into the United States? If so, does the Government "take" the property within the meaning of the Fifth Amendment if (a) the Secretary of the Treasury "suspends" the permit, (b) the Customs department takes physical possession of the property, and (c) the result is a total loss of the value of the property?

2. After a permittee has acquired property in reliance upon an unconditional import permit, can a Government agency change the rules under which the permit was issued, retroactively apply the changed rules, revoke the permit under the changed rules, and thereby destroy the value of the property, without paying compensation for the property/investment so affected?

3. Does it make a difference if the procedures employed by the Government agency preclude any effective remedy under the Administrative Procedures Act?

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STATEMENT OF JURISDICTION

This petition seeks review of a judgment of the United States Court of Appeals for the Federal Circuit entered October 14, 1993. The action was originally filed in the United States Claims Court (now Court of Federal Claims) which had jurisdiction pursuant to 28 U.S.C. section 1491. This case involves a determination of property rights under the Fifth Amendment of the Constitution of the United States and application of certain federal statutes. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. section 1254(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(Text is set forth in Appendix)

1. United States Constitution, Amendment V.
2. 5 U.S.C. section 553, subd. (c) and (d).
3. 18 U.S.C. section 925, subd. (d)(3).
4. 18 U.S.C. section 926, subd. (a) and (b).

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PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

This case presents an issue of basic fairness in the manner in which the Government deals with its citizens. In this case, the Government issued a permit for the importation of certain property, which stated on its face that it was valid for six months. Neither the permit, nor any regulation nor any statute contained any restriction or condition permitting revocation of the permit. The permittee, in reliance on that permit, purchased the property in question. Then the Government, without notice, suspended the permit, and seized the property at the port of entry. Thereafter the Government changed the rules under which the permit was issued, retroactively applied the *new* rules and *revoked* the permit, five months after the property arrived in the United States. The

property was rendered valueless because the United States was its only economically viable market. No compensation of any sort was paid to the permittee.

The permittee in this case, Mitchell Arms, has been continually frustrated in its attempts to receive simple common justice by virtue of the procedural shell game the Government has played. Mitchell Arms is in the business of importing and selling firearms. Mr. Don Mitchell is the President and owner of Mitchell Arms. Mr. Mitchell has been engaged in this business for over 20 years. It is beyond question that at all times Mr. Mitchell conducted his business in accordance with the law and with the permits he received from the Government. The property in question, which Mr. Mitchell sought to import, was semi-automatic rifles. It is undisputed that at the time the permits were issued to Mr. Mitchell, the importation of such rifles was completely authorized. Before the permits were ever issued, the rifles were inspected by the Bureau of Alcohol, Tobacco and Firearms ("BATF") to ensure that they complied with all import regulations. The rifles which were ultimately seized did not deviate in any respect from the model BATF physically inspected and approved for importation.

This is, admittedly, a case of some political sensitivity, since it deals with semi-automatic rifles. But Congress did not change any law affecting the rifles before the rifles reached the United States. Mr. Mitchell lost his entire investment simply because the Secretary of the Treasury changed his mind . . . retroactively! No small business like Mitchell Arms, can afford to lose millions of dollars because the Government decides to change its mind. The lower courts have, in effect, said to Mr. Mitchell: "Your expectations were reasonable. Your loss was real. But you are entitled to no relief."[1]

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[1] Indeed the Trial Court *did* say to Mr. Mitchell:

> "Mr. Mitchell, I am sorry I do not have a more favorable disposition towards your case. I hope you appreciate that I do not think that you were dealt with fairly, but I hope you understand that I cannot decide it on that basis. I have to decide according to what the law is. *I hope I am wrong; I hope you prevail on appeal. I*

The issues in this case go beyond the type of property involved and beyond the philosophical question of whether such rifles *should* be imported. International trade is already a major factor in U.S. commerce. The approval of NAFTA demonstrates that international trade will be much larger in the future. This Court should grant certiorari and explain to citizens what rights, if *any*, they have to import property *after* their Government issues an unconditional permit and *after* they expend money to acquire the property.

If Mr. Mitchell's loss is truly non-compensable as a matter of law, is any businessperson in any line of business secure in relying on any permit issued by the Government? Are Government employees (other than Congress) truly able to arbitrarily revoke such permits, at their whim, with absolutely no regard for the businesses and investments of the permittees? Is the Government power to "suspend" the rules and then revoke permits retroactively, which is the power it exercised in this case, limited to the importation of firearms, or does that power extend to all Government issued permits and licenses?[2] How is any businessperson supposed to know? Are Government employees free to change, without notice, the Government's definition of what property may be imported, and then seize the property that does not meet the new definition?

In Constitutional terms, does Mitchell have a regulatory taking claim because the Government retroactively changed the rules and destroyed the value of his property? That very basic question is now before the Court.

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genuinely do." (Transcript of hearing, U.S. Claims Court, March 31, 1992, emphasis added.)

[2]Another permittee challenged BATF's procedures and was successful in the district court. On appeal, however, at the urging of BATF, the Eleventh Circuit Court of Appeals specifically approved the procedures used by BATF. Therefore, the only legal process available for Mitchell was the instant action. That case is discussed in Section C, *infra*.

STATEMENT OF FACTS

A. Background of Mitchell Arms and the Statutory Framework

Mitchell Arms is a licensed importer of firearms. As required by law, Mitchell Arms obtained permits for all firearms which it imported into the United States. Permits for importation are issued pursuant to 18 U.S.C. section 925 and 27 C.F.R. section 178.112. 18 U.S.C. section 925(d)(3) states that the Secretary of the Treasury "shall" authorize the importation of firearms which are "generally recognized as particularly suitable for or readily adaptable to sporting purposes."

Each permit specifies the type and number of firearms which may be imported pursuant to that permit. Each permit is valid for six months. Once the permit expires a new permit must be obtain for continued importation. Prior to the issuance of a permit for the importation of any firearms, a sample of the firearm must be presented to BATF for inspection to ensure that it meets the standards for importation. Samples of the firearms which are the subject of this action *were* inspected and approved for importation by BATF.

B. The Permits And Rifles In Question

In 1986, in the normal course of business, Mitchell Arms entered into a contract to buy certain rifles (subject to getting the proper permit). As required by existing statutes and regulations, BATF physically inspected a sample of each rifle and determined that the rifles were suitable for "sporting purposes" in compliance with 18 U.S.C. section 925 and approved the rifles for importation.

For two years, Mitchell Arms imported these rifles. For two years, Mitchell Arms repeatedly applied for and was repeatedly granted permits for such importation. In December 1988, in continuation of this course of conduct, BATF approved four new permits for importation of these rifles, each valid for six months.

On January 17, 1989, Patrick Purdy opened fire with an AK-47 in a school yard in Stockton, California, killing several children.

The resulting public outcry not unpredictably included a demand from some quarters to restrict the sale of certain firearms.

On March 14, 1989, BATF issued a news release announcing that, effective immediately, BATF was suspending processing of applications for *new* permits to import assault rifles. On that day or the next, the president of Mitchell Arms, Mr. Don Mitchell, telephoned Ms. Carmen Alston, Assistant Chief of the Imports Branch of BATF, to inquire about the status of already approved permits. Ms. Alston told him, in substance or effect, that Mitchell Arms could rely upon its already approved permits. Thereafter, additional shipments were made and letters of credit were posted.[3]

Shortly after March 28, 1989, Mitchell Arms received a letter from BATF stating that the permits held by Mitchell Arms were "suspended." The letter stated that the permits were suspended to allow BATF to conduct a study to determine if the rifles were "generally recognized as particularly suitable for or readily adaptable to sporting purposes."[4] When it received news of the "suspension" Mitchell Arms was already contractually committed to the purchase of millions of dollars of rifles.

On May 18, 1989, a portion of the rifles and accessories arrived in New York. These were immediately seized by United States Customs and stored in a warehouse where they remain today. The balance of the rifles and accessories arrived in Los Angeles on May 29, 1989. These were similarly seized and stored by United States Customs. The permits expired according to their terms in June, 1989.

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[3]Whether or not Mitchell Arms could have avoided liability had Ms. Alston told him his permits were suspended or revoked is unknown. In fact Mr. Mitchell authorized and was financially responsible for shipments made after Ms. Alston's assurance.

[4]The issue of whether these rifles met the "sporting purposes" test previously had been decided in the affirmative by BATF following its inspection of the rifles in 1986. The rifles had not changed since they were physically inspected and approved by BATF in 1986.

On July 6, 1989, BATF issued a document entitled Report and Recommendation of ATF Working Group (the "July 1989 Report"). The July 1989 Report set forth several standards that BATF stated it would use in determining whether firearms met the "sporting purposes" test. These standards were new. They had not been published in any fashion prior to the suspension of Mitchell Arms' permits.

On November 6, 1989, (over seven months after the suspension) BATF issued a Decision (the "November 1989 Decision") in which it revoked the permits of Mitchell Arms.

The revocation was based upon BATF's new standards for the "sporting purposes" test. The November 1989 Decision announced that the new standards and the revocation would be applied "retroactively." The revocation left Mitchell Arms with no market for the firearms, and left the firearms with no market value. The firearms remained in the possession of the Government.

At no time throughout this entire process did Congress change the law which provides that the Secretary "shall allow" the importation of firearms suitable for "sporting purposes". What changed was BATF's own rules as to how it applied the "sporting purposes" test. Those rules were changed without notice, and retroactively applied, contrary to the terms of the permits and contrary to the requirements of the Administrative Procedures Act.

Neither the statutes nor the regulations which govern importation of firearms authorized the suspension or revocation of a permit once issued. Changes in rules concerning firearms importation are addressed in 18 U.S.C. section 926, which states that the Secretary of the Treasury may prescribe rules and regulations for the importation of firearms, upon "not less than ninety days public notice . . . ." 18 U.S.C. § 926(b). No prior notice was given in this case. Until the revocation which is the subject of this lawsuit, Mitchell Arms never had one of its permits revoked.

C. The Challenge to the "Temporary Suspension"

As the Court of Appeals noted (Opinion at p. 6a), the action by BATF was challenged by Gun South, Inc. ("Gun South") a firearms importer similarly situated to Mitchell Arms. Gun South sought a declaratory judgment and injunctive relief in federal district court under the provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706 (1988). The district court held the actions of BATF *ultra vires* and enjoined further governmental interference with the importation of firearms under validly issued permits. The Court of Appeals for the Eleventh Circuit reversed, holding that BATF had not acted outside the scope of its authority. *Gun South, Inc. v. Brady*, 877 F.2d 858, 861-864 (11th Cir. 1989), *re'vg* 711 F.Supp. 1054 (N.D. Ala. 1989).

What the Court of Appeals in the present case apparently overlooked in its discussion of the *Gun South* case, is that the Eleventh Circuit based its decision on the conclusion (which later turned out to be erroneous) that the action of BATF was a *temporary suspension* and not a permanent revocation of the permits. *Gun South, Inc. v. Brady, supra*, 877 F.2d at 861. The *Gun South* decision was issued in June 1989. In November 1989, having convinced the Eleventh Circuit that it was ruling on a temporary suspension, BATF, changed the suspension into a revocation, made it permanent and made it retroactive.

By November 1989, the rifles had been in Government possession for several months. Mitchell Arms now owned additional finance charges, significantly increasing its costs.[5]

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[5]In April 1990, after telephone conversations and correspondence with BATF, Mitchell Arms applied for a new permit to allow it to modify the rifles being held by the Government to meet the new criteria for "sporting purposes." BATF finally gave its approval for the modification and issued the new permit on September 26, 1990. Even with the new permit, Mitchell Arms was not able to overcome all of the damage that had been done. By September 1990, the rifles had been in Government possession for about 16 months. To obtain the rifles Mitchell Arms not only had to pay for the costs of modification, but also pay back the money it had borrowed to purchase the rifles in the first place, the interest that had been accruing on that money, and the storage charges

D. Proceedings And Lack Of Proceedings Below

Mitchell Arms filed a complaint in the United States Claims Court in October 1990. The Complaint asserted a taking of the property of Mitchell Arms as a result of the revocation by the Government of permits held by and relied upon by Mitchell Arms and the seizure by the Government of the rifles in question.[6]

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that the Government insisted on collecting. Mitchell Arms simply did not have the resources to pay this combined "ransom" and it was only able to retrieve and modify a portion of the rifles. The rest remain in Government possession. The lower courts never reached the issue of damages because they concluded that the government did not take any "property." Moreover, BATF recently refused to issue any additional permits to import the rifles, *even* if modified.

[6]From the filing of the Complaint on, the case did not proceed in a typical fashion. The Government filed no response to the Complaint. At a December 13, 1990, status conference the Trial Court directed the parties to file a stipulation of facts and to subsequently serve and file cross motions for summary judgment. The Trial Court stated that discovery should not be necessary. Specifically, the Trial Court said:

> I expect discovery to go by way of telephone. There's absolutely no reason why you should have to file any documents to get anything from [Plaintiff's counsel] or that he should have to do the same to get such documents from you. (Transcript of December 13, 1990 Status Conference, p. 30, line 8 - p. 31, line 16.)

In spite of the Court's comments, the Government promptly served written discovery requests upon Mitchell Arms. Mitchell Arms provided written responses and produced a substantial number of documents. Mitchell Arms then served its own set of discovery requests. Among other things, Mitchell Arms wanted to prove that BATF did *not* change the rules or suspend the permits because of any fear for public safety. Mitchell Arms has reason to believe that the entire exercise by BATF was due to a different agenda having nothing to do with the Secretary's legal duties.

The Government informed Mitchell Arms that it believed that many of the discovery requests sought information not relevant to the subject matter of the case. However, rather than answer the requests to which there was no objection and object to the remainder, the Government filed a motion for a protective order as to the entire discovery request.

(footnote continued)

Cross motions for summary judgment were filed in November 1991. Mitchell Arms filed a motion for partial summary judgment on the issue of liability. The Government filed a motion for dismissal or, in the alternative, for summary judgment. The Government at that time had the benefit of the responses by Mitchell Arms to the Government discovery. Mitchell Arms, on the other hand, as a result of the Government's motion for a protective order, and the Trial Court's suspension of ruling on that order, was denied all discovery. The effect of this denial of discovery may have prejudiced Mitchell Arms' ability to show the full and true character of the government's action which is an element to be considered in a takings case.

Oral argument on the cross motions was heard on March 31, 1992. On April 13, 1992, the Trial Court filed an order granting the Government's motion for dismissal. On April 14, 1992, judgment was entered. Mitchell Arms filed a timely appeal to the Court of Appeals for the Federal Circuit. On October 14, 1993, an order was entered by the Court of Appeals affirming the order of the Trial Court. This petition followed.

SUMMARY OF ARGUMENT

Mitchell Arms reasonably, substantially, and justifiably, relied upon the permits it had obtained. It based its reliance upon the permits themselves, the law and regulations under which the permits had been issued, its years of experience in the firearm industry in general, its years of experience in importing these particular firearms, and on express assurances from BATF that it could continue to rely on its permits. It also relied on the *absence* of any action in Congress directed toward changing the law.

Based on the foregoing, Mitchell Arms contractually obligated itself to spend millions of dollars to purchase the rifles identified

(footnote continued)

Before the response to the request for protective order was due from Mitchell Arms, another status conference was held. At this status conference the Trial Court set a briefing schedule for cross motions for summary judgment and also suspended the motion for a protective order, effectively denying Mitchell Arms the ability to obtain any responses to its discovery requests.

in the permits. In essence, Mitchell had a reasonable investment-backed expectation. In real property law terms, a financial reliance on a government issued permit is deemed to be a "vested right."

BATF revoked the permits based upon rules created after the permits were validly issued, after the firearms were purchased and after the firearms were seized. These new rules were made retroactive to the date of the suspension. There was no notice prior to the suspension that such new rules were even being considered. There never was any change in the United States Code or the Code of Federal Regulations.

Mitchell Arms contends that: (a) the permits issued to it were not the type of permits which BATF could revoke without notice or compensation, after reliance on the permits by Mitchell Arms; (b) the cases upon which the lower courts and the Government relied involved permits of a different character, which could be revoked without liability, or involved mere expectations which were not vested, and (c) revocation of the permits and seizure of the property itself was a taking of property without compensation in violation of the Fifth Amendment.

If the permits had been revoked *before* reliance thereon, there would have been no investment, no reasonable investment backed expectation and no damages. However, where, as here, petitioner had a contract to purchase the rifles in question, title passed to petitioner when the goods were identified (see Uniform Commercial Code § 2-401) and petitioner had orders to sell most of the rifles, there was substantial reliance and the permits could not be revoked without payment of compensation.

Whether this case is analyzed under the three prong test set forth in *Connelly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986) or under vested rights concepts of property law, Mitchell Arms is entitled to compensation for its property which was seized by the Government, pursuant to a retroactive application of new regulations.

ARGUMENT

I.

MITCHELL ARMS HELD PROPERTY RIGHTS THAT WERE TAKEN AS A RESULT OF THE REVOCATION OF THE PERMITS

The Court of Appeals ruled that since Mitchell Arms voluntarily entered into the firearms import business, a business known to be subject to governmental control, it could assert no property interest in the permits, regardless of the extent of reliance on the permits. The Court of Appeals reasoned that the Government had the right to revoke the permits, and that Mitchell Arms had no reasonable expectation in being able to use them, regardless of the amount of money invested and regardless of what other assurances were received from the Government. In so ruling the Court of Appeals disregarded the fact that in revoking the permits the Government ignored not only the express terms of the permits, but also ignored the rules by which the Government normally changes the standards by which such permits are issued. In a bootstrap argument, the Government, having suspended the permits, then asserted that since Mitchell had no permits, the firearms could not be imported. The Government thereupon took the firearms into its sole possession and control. The revocation of the permits and the seizure of the rifles resulted in an uncompensated taking under the Fifth Amendment.

A. By Law and Regulation, the Permits At Issue Are Not the Type of Permits Which the Government Can Revoke Without Liability.

The ruling of the Court of Appeals is based on the presupposition that the permits were at all times unconditionally revocable by the Government. The Court of Appeals reasoned, based upon that presupposition, that any reliance on the permits was unreasonable. Even in a business characterized by governmental regulation, there is no legal basis for such a sweeping generalization. In making its ruling, the Court of Appeals failed to draw any line between the permits issued for this business and any other Government issued permits and licenses. The only criteria the

Court of Appeals mentioned is that firearms are an area historically involving Government regulation. The problem with applying such criteria is that the same is true for *any* area in which a Government issued permit or license is involved.[7] The Court of Appeals ruling effectively makes all Government permits and licenses subject to immediate revocation at the whim of the Government, regardless of the terms of the permit and without regard to the requirements of the Administrative Procedures Act or any other statute governing the adoption or changing of Government rules and regulations.

There is nothing in the law or in the permits themselves that could have put Mitchell Arms on notice that its permits could or would be revoked without notice after Mitchell Arms had relied upon them. The law, the permits and the express assurances which the Government gave to Mitchell Arms were all to the contrary.

The statute which identifies what firearms may be imported is 18 U.S.C. section 925. Section 925(d) states, in part:

> The Secretary *shall* authorize a firearm or ammunition to be imported or brought into the United States or any possession thereof if the firearm or ammunition —
>
> * * *
>
> (3) is of a type that does not fall within the definition of a firearm as defined in section 5845(a) of the Internal Revenue Code of 1954 and is generally recognized as particularly

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[7]Although this case deals with importation of firearms, there is little, if anything, to distinguish this situation from the importation of *any* property. A very analogous situation, in fact, would be the case of a private citizen who travels overseas to purchase a car for import. He or she obtains a car specifically manufactured for the United States market; fully complies with all United States laws (including import permits); and pays or becomes contractually obligated to pay. Then, while in shipment, rules are changed and retroactively applied, and the car is seized at the docks. Under the theory it advances in this case, the Government would argue that no property had been taken.

> suitable for or readily adaptable to sporting purposes . . . . (Emphasis added.)

Nothing in this statute, or any other statute dealing with firearm importation, expressly gives the Government the right to suspend or revoke a permit once issued.

Mitchell Arms received its permits under Section 925. The language of that section did not thereafter change. The firearms imported by Mitchell Arms did not change. What happened is that the Government, suddenly and without notice, changed the standards of what constituted "sporting purposes." Although the final standards and final determination were not made until November 1989, they were made retroactive to March 1989. That change could not have been foreseen.

The regulations which govern the issuance of permits for the importation of firearms are found at 27 C.F.R. sections 178.111 through 178.118. The regulations contain no express authorization for the Government to suspend or revoke permits once issued. Section 178.112(b) states in part:

> If the Director [of BATF] approves the application, such approved application shall serve as the permit to import the firearm, firearm barrel, or ammunition described therein, and importation of such firearms, firearm barrels, or ammunition may continue to be made by the licensed importer under the approved application (permit) during the period specified thereon.

A procedure for changing the rules and regulations governing the importation of firearms *is* contained in the statutes. 18 U.S.C. section 926 states in part:

> (a) The Secretary may prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter . . . .
>
> * * *
>
> (b) The Secretary shall give not less than ninety days public notice, and shall afford interested parties opportunity for hearing, before prescribing such rules and regulations.

This notice requirement is consistent with the requirements of the Administrative Procedures Act (5 U.S.C. § 553) which also requires notice before implementation of new rules or regulations or of changes to rules or regulations. No such prior public notice was afforded in this case.

B. The Permits Were Not Licenses For Use of Government Property or Government Conferred Benefits Or Status Which May Be Revoked Without Liability

The Court of Appeals cited the case of *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) for the proposition that:

> enforceable rights sufficient to support a taking claims against the United States cannot arise in an area voluntarily entered into and one which, from the start is subject to pervasive Government control. (Opinion at pp. 9a-10a.)

Not only is this an overbroad reading of the ruling in the *Bowen* case, but the *Bowen* case itself is, both on the law and the facts, distinguishable from the present case. *Bowen* was concerned with legislation enacted by Congress which changed the law governing social security, resulting in the elimination of the right of public entities participating in the program to withdraw from participation. The participation of the public entities had been pursuant to contracts between the public entities and the Federal Government. Those contracts gave the entities the right to withdraw from the program. The entities argued that those contract rights were property for which they were entitled to compensation.

This Court noted that the Social Security Act contained the express provision that Congress reserved the authority to alter the provisions of the Act. *Bowen, supra*, 477 U.S. at 53. This "language of reservation" was "expressly incorporated" into the contracts between the public entities and the Federal Government. *Id.*, 477 U.S. at 54. The Court reasoned that since the contracts themselves gave Congress the right to amend the Act, the change in the law was neither a breach of the contracts nor a taking of private property.

thereof, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established. Nothing in this section expands or restricts the Secretary's authority to inquire into the disposition of any firearm in the course of a criminal investigation.

(b) The Secretary shall give not less than ninety days public notice, and shall afford interested parties opportunity for hearing, before prescribing such rules and regulations.

As explained above, no similar reservation of rights to alter, suspend or revoke is contained in the permits in this case, or in the applicable statutes or regulations under which the permits were issued. Moreover, it was not Congress which changed the law in this case. It was BATF which adopted and retroactively imposed the new rules.

The present case involves a present property interest, not a mere expectation. The investment had already been made and the contractual obligations already incurred before the permits were suspended (and later revoked). Thus this case is unlike the case of *Allied-General Nuclear Services v. United States*, 839 F.2d 1572, 1575-1576 (Fed.Cir. 1988), which the Court of Appeals found to be analogous to the situation in the present case. (Opinion at p. 10a.) In *Allied General*, the court held that the "expectation" of receiving an operating license for a nuclear power plant was not property. Mitchell Arms does not argue that it had a right to "receive" a permit or had an "expectation" of obtaining a permit. It already held permits.

The permits in the present case were issued with the clear understanding that the private party would rely on the permits by importing the private property identified in the permits. Where, as here, that private property is dependent upon the continued vitality of the permit for its very value, a property interest is created when the property is purchased (or an obligation to purchase is incurred) in reliance upon the permits. Before such reliance, there is no damage if the permit is revoked. After such reliance, any action by the Government to revoke the permits, assertedly taken in the public interest, (particularly if the Government action is outside of the procedures and standards set forth in the permits and the applicable statutes and regulations), amounts to a compensable taking of a private property interest. The instant case is more similar factually to *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed.Cir. 1990), discussed *infra* at p. 20, wherein the court held that denial of approval of a mining plan was a taking of the leases to which the plan applied.

C. Mitchell Arms Was Denied Key Elements of Its Property Rights. The Action of the Government Therefore Constitutes A Taking

Property rights are generally described as a "bundle of rights" or "bundle of sticks," each stick constituting a particular attribute of property ownership. *See Florida Rock Industries, Inc. v. United States*, 8 Cl.Ct. 160, 165 (1985), *aff'd in part, vacated in part and remanded*, 791 F.2d 893 (Fed.Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987) (Held: Denial of Section 404 permit was a regulatory taking of the property; property rights referred to a "bundle of sticks."); see also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982) (Held: Grant of easement by public authority over private property to install cable lines is a taking; property referred to as a "bundle of rights"); *Kaiser Aetna v. United States*, 444 U.S. 164, 167 (1979); (Held: Government could not open dredged pond which fell within definition of "navigable waters" to public without compensation; property referred to as a "bundle of rights"); *Frank Lyon Co. v. United States*. 536 F.2d 746, 751 (8th Cir. 1976) (Regarding calculation of tax on lease interest; "property rights can be analogized to a bundle of sticks. Each stick represent an interest in the underlying *res* which is the object of property."); *In re Rancourt*, 123 B.R. 143, 147, n.2 (Bkrtcy D.N.H. 1991) (Regarding rights of mortgagee; ownership of real property "has been likened in the past to the holding of a 'bundle of sticks' representing all the various interests that can be held in real property . . . ."); and *In re Hunt*, 136 B.R. 859, 862 (Bkrtcy D.Oregon 1992) (Regarding rights of mortgagor; fee title to property referred to as the "complete 'bundle of rights' ").

A compensable taking may be found when some of those rights (certain of those "sticks") have been injured. As this Court stated in *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1944) (regarding compensation for temporary taking of lease): "The constitutional provision is addressed to *every sort of interest* the citizen may possess." (Emphasis added.)

Although courts have identified certain attributes which should be examined in takings cases, no court has attempted to set forth a hard and fast rule or "set formula" as to when a taking will be

deemed to have occurred. *Connelly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1985). This Court has stated that the issue of whether a taking has occurred must be examined on an "ad hoc" basis. *Kaiser Aetna v. United States, supra*, 444 U.S. at 175, *Connelly v. Pension Benefit Guaranty Corp., supra*, 475 U.S. at 224. Thus in each case the court must examine which particular sticks have been taken from the bundle in order to determine if a taking has occurred.

Although it is true that the permits do not contain an express "guarantee" against revocation, it is also true that they do not state that they are revocable. Neither the permits nor the statutes and regulations under which they were issued state that the Government reserved the right to revoke them.

The permits in this case are, in many respects, similar to Section 404 permits issued by the Army Corps of Engineers to allow dredging and filling. The regulations governing those permits expressly state that they do not confer any property interest.

> Authorization of work or structures by DA does not convey a property right . . .
>
> 33 C.F.R. Section 320.4(g).
>
> A DA permit does not convey any property rights, either in real estate or material, or any exclusive privileges.
>
> 33 C.F.R. Section 320.4(g)(6).

Section 404 permits have a limited duration and their renewal is not guaranteed. 33 C.F.R. Section 325.6. There is no "guarantee" against revocation. The regulations provide that the permits may be suspended or revoked "in the public interest." 33 C.F.R. Section 325.7.

Despite these restrictions, denial of a Section 404 permit has been held to constitute a taking of property requiring compensation. See, e.g., *Florida Rock Industries, Inc. v. United States*, 21 Cl.Ct. 161 (1990). In *Florida Rock*, the plaintiff's real property lost value because of the denial of a Section 404 permit. In the instant case, plaintiff's personal property lost value because of the

revocation of its permit. There was a property interest, and a taking, in both cases.

D. Mitchell Arms Was Denied the Protections of the Administrative Procedures Act and of 18 U.S.C. Section 926.

Mitchell Arms was *not* afforded the procedural protection of the Administrative Procedures Act, *nor* was Mitchell Arms afforded the procedural protections of 18 U.S.C. section 926. Both Section 926 and the Administrative Procedures Act require prior public notice before a regulation or rule may be implemented. Had that procedure been followed, this case would never have been filed. If the Government had announced in March 1989 that it intended to implement a new definition of "sporting purposes" within ninety days, the firearms of Mitchell Arms would have been imported, and sold, before those new rules went into effect. That is not what happened.

What happened was that in March 1989, the Government "suspended" the permits. It then started a "study" which resulted in a Report which was made public in July 1989. That was the first time that the new standards defining "sporting purposes" were made public. Mitchell Arms responded to the July 1989 Report and in November 1989, a Decision was issued, finalizing the new definition of "sporting purposes", declaring the permits revoked, and making the revocation, and the new "sporting purposes" definition, retroactive to March.

Although Mitchell Arms was denied the protections of the Administrative Procedures Act, Mitchell Arms was unable to bring an Administrative Procedures Act claim due to the unusual nature and timing of the Government action.

The BATF action was originally announced in March 1989 as a *suspension*. This action *was* challenged. The Court of Appeals ruled in favor of the Government. *Gun South, Inc. v. Brady*, 877 F.2d 858 (11th Cir. 1989). It was not until November, over seven months later, that the true nature of the action was disclosed, i.e., the retroactive implementation of new rules without prior notice, and revocation of permits. Had the new rules been announced in March, or the permits revoked in March, perhaps Mitchell Arms

could have challenged them at that time under the Administrative Procedure Act and obtained prompt return of its property. By November, the firearms had been in the possession of the Government for seven months and Mitchell Arms had suffered substantial economic damages, not the least of which were monthly storage charges. Those damages could not be recovered through an Administrative Procedures Act action.

Gun South, Inc. v. Brady, 877 F.2d 858 (11th Cir. 1989) was an action by one of the other arms importers affected by the Government suspension of permits in March of 1989. That particular case dealt only with the *suspension* of permits. At the time the decision was rendered, neither the July 1989 Report nor the November 1989 Decision had been issued. The Eleventh Circuit did not have before it BATF's new standards regarding "sporting purposes", and the issue of a permit revocation based upon these new standards and retroactive to March 1989 did not yet exist.

In *Gun South*, the Eleventh Circuit said that BATF had the authority to suspend individual permits to determine if they had been "erroneously" issued. *Gun South, Inc. v. Brady, supra*, 877 F.2d at 859. *However, the revocation that was ultimately issued was based upon a change in the rules that were applied, not upon any "error" in the application of existing rules.* The court in *Gun South* emphasized that it was dealing only with the "suspension" of a permit and not with "revocation." *Id.*, 877 F.2d at 867. The court stated: "As discussed above, the Bureau *has not revoked* GSI's license or its permits . . . ." *Id.*, 877 F.2d at 865, emphasis added.

The Eleventh Circuit also indicated that the issue before it was the reassessment of individual permits. The court described its understanding of the nature of the BATF action as follows:

> The Bureau . . . . has *merely suspended* certain firearms from importation while it *individually reassesses* several permit determinations. These activities . . . . involve applying the law to the facts of an individual case . . . .
>
> *Id.*, 877 F.2d at 865, (emphasis added).

As we now know, the nature of the Government action was entirely different from that which the *Gun South* court supposed it to be. There was not a mere suspension, but a revocation, made effective as of the date the suspension was announced. This was not an individual reassessment of an individual case but a wholesale change in the basic rules defining "sporting purposes." One can only wonder how the *Gun South* court would have decided, had it known the truth about the nature of the Government action.

E. The Facts of This Case, Taken in Toto, Invested Mitchell Arms With a Vested Property Right in the Firearms.

Revocation of the permits and the seizure of the firearms by United States Customs upon their arrival in the United States constituted a seizure of the private property of Mitchell Arms. This is true whether the property in this case is considered to be the permits together with the firearms, or either of them separately.[8]

United Nuclear Corporation v. United States, 912 F.2d 1432 (Fed.Cir. 1990) is a case which illustrates just the problem and issues presented in the instant case. In *United Nuclear*, the plaintiff entered into a lease of Indian Reservation land with the Navajo Tribe. The lease could not be used in any respect without certain prior authorizations from the Secretary of the Interior. The Secretary did approve an "exploration plan." Thereafter

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[8]In its opinion, the Court of Appeals below erroneously concluded that Mitchell Arms did not assert that the seizure of the firearms was itself a taking or assert that a property interest existed in the permits. Mitchell Arms does assert, and has asserted, that the seizure of the property did constitute a taking and that, having invested in reliance on the permits their revocation was a taking. The permits are an integral part of the property. Suppose one obtains a valid permit to construct a house, builds one-half of a house, then the permit is revoked, and the house is torn down by the Government. If the landowner is compensated in an inverse condemnation action, is he compensated for loss of the permit or for loss of one-half of his house? In this case, the Government's regulatory action of retroactively revoking the permits, combined with its actual seizure of the property, constitute a compensable taking.

plaintiff expended $5 million in exploring the property. United Nuclear then submitted a mining plan to the Secretary. The mining plan met "all the regulatory requirements." *Id.*, 912 F.2d at 1434. Nevertheless, the Secretary refused to approve the mining plan because the Tribe did not approve it. This requirement of Tribal approval "never had been required previously." *Id.*, 912 F.2d at 1434.

In a decision remarkably similar to the decision of the Trial Court in the present case, the Claims Court in *United Nuclear* held that the property at issue was not the leases, but the expectation of approval of the mining plan. *Id.*, 912 F.2d at 1435. The Claims Court concluded that there had been no taking. The Court of Appeals reversed, holding that the property interest at issue was the leasehold interest, notwithstanding the fact that the government action had consisted solely of failure to approve the mining plan. *Id.*, 912 F.2d at 1437. The Court of Appeals then went on to hold that there had been a taking of that leasehold interest. The economic impact was that United Nuclear forfeited the funds it had spent, the lease term expired without United Nuclear being able to conduct mining operations, and United Nuclear lost the profits it would have made. *Id.*, 912 F.2d at 1435-1436.

The court held that United Nuclear's distinct investment-backed expectations had been frustrated. The court reversed the Claims Court's ruling that United Nuclear should have anticipated that regulations might change "under the existing scheme, to which it voluntarily submitted itself." *Id.*, 912 F.2d at 1436. Instead, the court stated:

> United justifiably believed and expected that if its mining plan met the requirements, the Secretary would approve it — as he had done for United's exploration plan.
>
> *Id.*, 912 F.2d at 1436.

The court further stated:

> The fact that United agreed that the leases would be subject to future regulations does not indicate that United fairly can be said to have anticipated that the Secretary

> would apply a new policy requiring tribal approval of mining plans to leases entered into almost six years earlier, in reliance on which United had expended some $5 million. *Id.*, 912 F.2d at 1436.

Finally, in analyzing the nature of the government action, the court found that it was not a case of the government preventing the use of property in an injurious manner. *Id.*, 912 F.2d at 1437-1438.

In the present case, as in *United Nuclear*, there is property (here rifles, there a lease) which has value and can be used only in connection with government authorization (here permits, there approval of a mining plan). As in *United Nuclear*, withholding or revocation of the government authorization, based upon new requirements, acted as a taking of the property. Both Mitchell Arms and United Nuclear made substantial investments based upon their authorizations. Neither could have foreseen the new requirements. Thus, distinct investment backed expectations were frustrated in both cases. Neither involved the use of property in a harmful way. The type of rifles which Mitchell Arms sought to import may still be manufactured and sold in this country. In this case, as in *United Nuclear*, there was a property interest and a taking.[9]

F. Mitchell Arms Obtained a Vested Right by Reliance Upon the Permit.

Many jurisdictions recognize the concept of vested rights which protects a private party's investment made in reliance upon a government issued permit from subsequent changes in government requirements or regulations. The California Supreme Court, for example, stated:

> It has long been the rule in this state and in other jurisdictions that if a property owner has performed substantial work

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[9]In a similar situation, in *NRG Company v. United States*, 24 Cl.Ct. 51 (1991), the Claims Court held that the imposition of a new requirement resulting in the denial of a mining permit acted as a taking of the lease.

> and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit. (*Dobbins v. City of Los Angeles* (1904) 195 U.S. 223 (49 L.Ed 169, 25 S.Ct. 18); *Trans-Oceanic Oil Corp. v. Santa Barbara* (1948) 85 Cal.App.2d 776, 784 (194 P.2d 148).)
>
> *AVCO Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal.3d 785, 791 (1976), *cert. denied* 429 U.S. 1083 (1977) (Held: Builder did not have vested right to construct buildings if final building permit had not been issued prior to implementation of new regulations.).

The California Supreme Court has held that the vested rights doctrine "is grounded upon the constitutional principle that property may not be taken without due process of law." *Urban Renewal Agency v. The California Coastal Zone Conservation Commission*, 15 Cal.3d 577, 583-584 (1975).

> Once a right has vested, its impairment or destruction must comport with constitutional principals. However, acquisition of the right is granted upon equitable principals of estoppel. [Citation.]

Aries Development Co. v. California Coastal Zone Conservation Committee, 48 Cal.App.3d 534, 548 (1975).

> [T]he vested rights doctrine is 'predicated upon estoppel of the governing body' [citation] '[a]n equitable estoppel requiring the government to exempt a land use from a subsequently imposed regulation must include (1) a promise such as that implied by a building permit that the proposed use will not be prohibited by a class of restrictions that includes the regulation in question and (2) reasonable reliance on the promise by the promisee to the promisee's detriment. [*Ibid.*] [Citation] . . .

Russ Building Partnership v. City and County of San Francisco, 44 Cal.3d 839, 853-854 (1988).

The vested rights doctrine enforced in California is similarly enforced in other jurisdictions.

> The general rule is that revocation of a validly issued building permit may not be based on a zoning regulation enacted or becoming effective after the issuance of the permit, if the permittee, in reliance on the permit or on the existing zoning, has made substantial expenditures or otherwise committed himself to his substantial disadvantage.

Chase, "Retroactive Effect of Zoning Regulation, In Absence Of Saving Clause, On Validly Issued Building Permit", 49 ALR.3d 13, 26-27 (1973).

There is no logical reason why the concept of vested rights which has been applied to construction on real property, should not also be applied to reliance on permits related to the purchase and use of personal property. There is also no reason why this doctrine should not apply equally to permits issued by the federal government as well as to permits issued by state and local governments. The estoppel doctrine has been applied to the federal government in favor of private parties. *United States v. Georgia-Pacific Coast*, 421 F.2d 92 (9th Cir. 1970) (Held: Government estopped from compelling private party to turn over land under terms of agreement where Government had failed to provide fire protection as required by the agreement and where Government allowed private party to invest substantial sums in the property and its management).

Vested rights is a concept that is fair and just and should be applied to the import permits of Mitchell Arms.

G. The Government's Ability to Govern and Regulate Is Not Threatened by a Finding That There Was a Property Right and A Taking in This Case.

Some takings cases have mentioned the fact that the Government could not operate if every change of law or policy required that compensation be paid to every person adversely affected. That consideration is of no consequence in the instant matter. This case does not threaten the ability of the Government to operate nor does it threaten to interfere with the ability of the

Government to control foreign commerce. This case asks for compensation for Mitchell Arms, which is one of a tiny handful of companies which have been forced to bear the entire cost of an unannounced change in Government policy and regulations. Under the particular facts of this case, Mitchell Arms is entitled to compensation.

Mitchell Arms does not argue in this brief that the Government, Congress, or even a Government employee is without the authority, when the Government deems it necessary, to revoke permits without notice. What Mitchell Arms does argue is that when such extraordinary action is taken for a public purpose, and the impact of that action falls on a few citizens, compensation must be given for the private property that is taken from those few.

II

ALL ELEMENTS REQUIRED FOR A FINDING OF A TAKING ARE PRESENT IN THIS CASE

In *Connelly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986), this Court stated that cases

> have eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case. [Citation.] To aid in this determination we have identified three factors which have 'particular significance': (1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.'

Id., 475 U.S. at 224-25, 106 S.Ct. at 1025-26. *See also Atlas Corp. v. United States*, 895 F.2d 745, 756-57 (Fed.Cir. 1990); *United States v. One (1) 1979 Cadillac Coupe de Ville*, 833 F.2d 994, 1000 (Fed.Cir. 1987).

A. Economic Impact on Mitchell Arms.

As Mr. Mitchell explained in his declaration below, the rifles have only one viable market, the United States. Revocation of the permits eliminated that market and deprived the rifles of their market value. The deprivation was total.

The Government's argument that value remained because the rifles could be modified and then imported and sold is deceptively misleading.[10] The rifles have no value in their present condition. They could acquire value only if Mitchell Arms is able to obtain additional financing and make additional investments to pay for the modification work. This is not a question of whether value is remaining after the Government action, but whether value could be acquired by means of additional investment. There is no legal requirement for Mitchell Arms to make additional investment to change its property once it has been taken.[11] Nor is it reasonable or just to make Mitchell Arms' right to compensation contingent upon the willingness of third parties to advance additional financing.

Secondly, the rifles can be modified only if Mitchell Arms obtains the necessary permits to import the modified rifles. The Government argues that Mitchell Arms has no *right* to obtain *any* such permits. Indeed under the Government's analysis, Mitchell Arms could not reasonably rely on such permits to make investments even if the permits were issued.

B. The Government Action Frustrated the Reasonable Investment Backed Expectations of Mitchell Arms.

Mitchell Arms entered its contractual obligations at a time when it held valid permits. It believed, based upon its years of experience in the industry and upon specific and express assur-

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[10]Recently BATF refused to reissue a permit to import the rifles *even* if they are modified.

[11]In *United Nuclear,* for example, the court found a taking had occurred. The plaintiff was not required to pay any additional amount to the Tribe to reinstate the lease. *United Nuclear Corp. v. U.S., supra,* 912 F.2d at 1438.

ances of the Government, that it could continue to rely upon these permits. Mitchell Arms did everything it reasonably could have done to insure the validity of its permits. The Government action of suspending and ultimately revoking those permits after Mitchell Arms was committed to the purchase of the rifles, was contrary to the practices that the Government had followed for years, contrary to all experience of Mitchell Arms, contrary to the statutes and regulations governing importation permits, and contrary to specific and express assurances that the Government had given Mitchell Arms.

C. Character of Government Action.

1. The Government Action Was a Complete Denial of Economically Viable Use of the Property.

This was not merely a limitation on the use of the rifles. This was a complete prohibition on the sole use for which these rifles had any market value. It is well established that a regulation which so severely restricts the use to which property may be put amounts to a regulatory taking of the property. In *Florida Rock Industries, Inc. v. United States,* 21 Cl.Ct. 161 (1990), denial by the Army Corps of Engineers of a permit to fill plaintiff's property was held to constitute a taking of that property.

In the recent case of *Lucas v. South Carolina Coastal Council,* 505 U.S. ____, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), this Court held that a regulation which does not substantially advance legitimate state interests or denies an owner economically viable use of his property, violates the takings clause of the Fifth Amendment. The Court held that state limitation on use of beachfront property amounted to a taking of that property, at least a temporary taking. It is interesting to note that all Lucas "had" was ownership of the property and an "expectation" of getting a permit to build on that property. Mitchell Arms had the property *and* the permit and the Government took both. Isn't Mitchell's constitutional right as good as Lucas'?

2. Mitchell Arms Was Denied the Ability to Conduct Discovery into the True Nature and Effect of the Government Action.

As explained above, Mitchell Arms was denied the ability to conduct discovery in this case. At a minimum, discovery would have allowed Mitchell Arms to obtain information that would have clarified the true nature and purpose of the Government action.

Even without discovery it is clear from the information that is available, that the purpose was not to prevent some harmful use of the property. Although these particular rifles were seized, the sale of the very same type of rifles, manufactured in the United States, remained legal.

Information obtained through discovery would make it clear that this is not a case involving huge numbers of firearms, and thousands of persons. It is not a case where Government operations could not continue if compensation was required for every person affected. Instead, it is a case of the Government allegedly attempting to provide a public benefit, by limiting the number of imported rifles, and placing the entire cost of providing that benefit on the handful of importers caught in the same position as Mitchell Arms. This is precisely the type of situation in which compensation under the Fifth Amendment has been traditionally required.

III. CONCLUSION

The executive branch of the Government has taken the position that, without violating the Fifth Amendment, it can change the rules and, based on the new rules, retroactively revoke previously issued import permits on which citizens relied in making investments. Can it?

This case involves only Mitchell Arms. This question involves every citizen who wishes to import property.

This Court should grant certiorari in order to establish the rules.

For the foregoing reasons, appellant respectfully urges the Court to grant certiorari.

Dated: January 11, 1994

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APPENDIX

APPENDIX

PART A: JUDGMENT OF WHICH REVIEW IS SOUGHT

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

92-5125

MITCHELL ARMS, INC.,
Plaintiff-Appellant,
v.
THE UNITED STATES,
Defendant-Appellee.

Alvin S. Kaufer, Nossaman, Guthner, Knox & Elliott, of Los Angeles, California, argued for plaintiff-appellant. With him on the brief was *John Ossiff,* of counsel.

Mark B. Stern, Attorney, Department of Justice, of Washington, D.C., argued for defendant-appellee. With him on the brief were *Stuart M. Gerson,* Assistant Attorney General and *Michael Jay Singer,* Attorney.

Appealed from: U.S. Court of Federal Claims
Judge Wiese

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

92-5125

MITCHELL ARMS, INC.,
Plaintiff-Appellant,
v.
THE UNITED STATES,
Defendant-Appellee.

DECIDED: October 14, 1993

Before RICH, LOURIE, and SCHALL, *Circuit Judges.*
SCHALL, *Circuit Judge.*

Mitchell Arms, Inc. (Mitchell), appeals from the April 14, 1992 judgment of the United States Claims Court dismissing its complaint under Rule 12(b)(4) of the United States Claims Court (RUSCC) for failure to state a claim upon which relief could be granted.[1] In its complaint, Mitchell contended that the actions of the Bureau of Alcohol, Tobacco, and Firearms (ATF) revoking permits issued to Mitchell for the importation of certain firearms and suspending for ninety days the permits for the importation of certain other firearms constituted compensable takings under the Fifth Amendment of the United States Constitution. In ordering the dismissal of Mitchell's complaint, the Claims Court concluded that Mitchell had not asserted the kind of property right that could be the subject of a taking claim. *Mitchell Arms, Inc. v. United States*, 26 Cl. Ct. 1 (1992). We affirm.

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[1] As of October 29, 1992, the United States Claims Court became the "United States Court of Federal Claims," pursuant to the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902(a), 106 Stat. 4506, 4516. We will refer to the court by the name which it had while this matter was pending before it.

BACKGROUND

The pertinent facts are not in dispute. The Gun Control Act of 1968, Pub. L. No. 90-612, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921-930 (1988)), provides four exceptions to a general prohibition on the importation of firearms. Under one of those exceptions, the Secretary of the Treasury, through ATF, "shall authorize" the importation of firearms which are, among other limitations, "generally recognized as particularly suitable for or readily adaptable to sporting purposes . . ." 18 U.S.C. § 925(d)(3).

Mitchell is a federally-licensed firearms importer involved in the sale of commercial firearms to wholesale distributors and retail dealers. In 1986, it entered into a contract with the Federal Directorate of Supply of Yugoslavia (the Directorate) to buy certain firearms, commonly referred to as "assault rifles."[2]

Mitchell submitted for ATF inspection a sample of each rifle to be imported under its contract with the Directorate. In 1987, after approval of the samples, ATF issued Mitchell permits authorizing the importation of the rifles. Each import permit was valid for six months and specified a type and quantity of firearms. Once a permit expired, a new permit was required in order for Mitchell to continue importation of the previously-approved firearms. *See* 27 C.F.R. § 178.112(b) (1988).

Mitchell imported rifles under the permits throughout 1987 and 1988. In December of 1988, Mitchell obtained renewal of four permits authorizing the importation of some 9,000 assault rifles.

On March 14, 1989, ATF issued a news release announcing the suspension of pending applications for import permits. Following the announcement, Mitchell contacted ATF and was told that it

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[2]Use of the term "assault rifles" to describe the firearms at issue is somewhat of a misnomer. True assault rifles typically have selectable fire modes, including a fully automatic mode. As used throughout the litigation of this case and in this opinion, the term "assault rifles" is generically used to describe a commercial class of semiautomatic firearms having an appearance similar to military weapons and a large capacity ammunition magazine.

could rely on its issued permits. Shortly thereafter, Mitchell confirmed an order with the Directorate for a quantity of assault rifles. Mitchell apparently intended to import the rifles under its existing permits, which were to expire in June of 1989. Before manufacturing the rifles, however, the Directorate required that Mitchell obtain an irrevocable letter of credit in order to pay for the firearms.

On March 21, 1989, ATF suspended the importation of assault rifles under existing permits, pending a study to determine if the assault rifles identified in the permits met revised criteria for the sporting purposes exception of 18 U.S.C. § 925(d). Mitchell received notification of the suspension on March 31, 1989. On April 3, 1989, Mitchell executed an irrevocable letter of credit formalizing the financial arrangements for its March order with the Directorate.

The assault rifles were shipped to Mitchell in April and May of 1989, arriving at Los Angeles and New York port facilities. The United States Customs Service refused entry of the rifles for lack of a valid import permit.

On July 12, 1989, ATF issued a preliminary determination generally banning further importation of assault rifles. In the determination, ATF found that assault rifles like the ones covered by Mitchell's suspended permits no longer satisfied the statutory criteria for importation under the sporting purposes exception. In conjunction with the suspension and revocation of permits to import assault rifles, ATF also temporarily suspended permits to import .22 caliber semiautomatic rimfire rifles, to the detriment of Mitchell, which was in the process of importing such rifles. This suspension lasted approximately ninety days.

After receiving comment from Mitchell and other interested parties, ATF issued a final decision on November 6, 1989, rejecting the various arguments for continued importation of assault rifles. In its final decision, ATF refused Mitchell's request that the ban on assault rifles not be extended to weapons for which import permits had previously been approved.

The final ATF decision included provisions designed to alleviate the hardship resulting from the revocation of existing permits.

Specifically, ATF advised Mitchell and other affected importers of alternative commercial uses for the banned rifles, including sale to certain government agencies and export to other countries. ATF also suggested that Mitchell modify the rifles to meet new import criteria. Mitchell modified and disposed of approximately half of the original 9,000 rifles seized by the Customs Service.

Gun South, Inc. (Gun South), a firearms importer similarly situated to Mitchell, challenged ATF's authority to temporarily suspend issued import permits and the Customs Service's seizure of its firearms. Gun South sought a declaratory judgment and injunctive relief in federal district court under provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 706 (1988). The district court concluded that ATF's actions were *ultra vires* and enjoined further government interference in the importation of firearms under validly issued permits. on appeal, the United States Court of Appeals for the Eleventh Circuit reversed, concluding, contrary to the district court, that ATF had not acted outside the scope of its statutory authority when it temporarily suspended Gun South's permits. *See Gun South, Inc. v. Brady*, 877 F.2d 858, 861-64 (11th Cir. 1989), *rev'g* 711 F. Supp. 1054 (N.D. Ala. 1989).

On October 19, 1990, Mitchell filed an action in the Claims Court alleging that the suspension and revocation of its import permits constituted a compensable taking under the Fifth Amendment. As noted above, the Claims Court dismissed Mitchell's complaint for failure to state a claim upon which relief could be granted. In its decision accompanying the order to dismiss, the court concluded that neither the permits themselves nor Mitchell's expectations arising from the combination of the permits and its contract with the Directorate amounted to "a property interest" within the meaning of the Just Compensation Clause of the Fifth Amendment. This appeal followed.

DISCUSSION

I

THE STANDARD OF REVIEW

A motion to dismiss for failure to state a claim upon which relief can be granted is appropriate where the plaintiff cannot assert a set of facts which would support its claim. *Chang v. United States*, 859 F.2d 893, 894 (Fed. Cir. 1988). In reviewing the granting of a motion to dismiss under RUSCC 12(b)(4), we must "assume all well-pled factual allegations are true and indulge in all reasonable inferences in favor of the nonmovant." *Gould v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). We review the Claims Court's legal conclusions *de novo*. *Id.* at 1273.

As noted above, in this case, the pertinent facts are not in dispute. The issue decided by the Claims Court, and before this court on appeal, is whether the presumptively correct actions of ATF in suspending and revoking the permits constituted a compensable taking under the Fifth Amendment. *Florida Rock Indus. v. United States*, 791 F.2d 893, 899 (Fed. Cir.), *cert. denied*, 479 U.S. 1053 (1986) (in the context of a taking claim premised on the denial of a permit, the lawfulness of the denial must be taken as a given). In any event, Mitchell does not contend that ATF's actions in this matter were unlawful. Mitchell's brief at 32.

II

ANALYSIS

The Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation." As we pointed out in *Atlas Corp. v. United States*, 895 F.2d 745, 756 (Fed. Cir. 1990), "the Fifth Amendment requires compensation for losses due to government action only where there has been a 'taking' of 'property' for public use." As seen above, the claims court concluded that Mitchell had not asserted the kind of property right that could be the subject of a taking claim.

Mitchell does not contend that either the firearms or the permits constituted the property that was taken. Rather, it argues that its contractual relationship with the Directorate, which it says was entered into in reliance upon the issued permits, gave rise to a reasonable investment-backed expectation protected by the Fifth Amendment. Put another way, Mitchell claims that a property interest was created when it agreed to purchase the assault rifles with an expectation of importing them under the issued permits. Thus, Mitchell asks us to hold that its investment-backed reliance on the issued import permits constituted "property" within the meaning of the Fifth Amendment. We decline to do so.

The chief and one of the most valuable characteristics of the bundle of rights commonly called "property" is "the right to sole and exclusive possession — the right to *exclude* strangers, or for that matter friends, but especially the Government." *Hendler v. United States*, 952 F.2d 1364, 1374 (Fed. Cir. 1991) (citation omitted). In this case, Mitchell did not possess such a right.

In holding that Mitchell had not asserted a property right protected by the Fifth Amendment, the Claims Court relied upon *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986). In *Bowen*, the Court addressed a statutory change restricting the State of California's contractual right to withdraw from the Social Security system.

When Congress enacted the Social Security Act of 1935, it expressly reserved to itself "[t]he right to alter, amend, or repeal any provision of" the Act. Social Security Act of 1935, ch. 531, § 1104, 49 Stat. 620, 648 (current version at 42 U.S.C. § 1304 (1988)). In 1950, Congress enacted Section 418 of the Act to permit States to participate in the Social Security System on a voluntary basis by entering into agreements with the federal government (§ 418 Agreements). *Bowen*, 477 U.S. at 45. As originally enacted, and through 1983, Section 418 permitted States to terminate their § 418 Agreements and thereby withdraw from the Social Security System. 42 U.S.C. § 418(g)(1) (1982). In due course, California entered into a § 418 Agreement.

In 1983, Congress amended Section 418 by repealing the termination provision. Social Security Amendments of 1983, Pub. L. No. 98-21, § 103, 97 Stat. 65, 71-72. California filed suit to enjoin enforcement of amended section 418(g) and also sought a declaration that the amended section was unconstitutional. The United States District Court for the Eastern District of California agreed, reasoning that the contractual right to withdraw, which was set forth in California's § 418 Agreement, constituted "private property" within the meaning of the Just Compensation Clause of the Fifth Amendment.

On appeal, the Supreme Court reversed and held that the statutory change restricting California's contractual right to withdraw from the Social Security System did not constitute the taking of a property interest for which just compensation was due. The Court decided that California's contractual right to withdraw did not rise to the level of "property" within the meaning of the Fifth Amendment. 477 U.S. at 55. The Court noted that the termination provision "was part of a regulatory program over which Congress retained authority to amend in the exercise of its power to provide for the general welfare." *Id.* Accordingly, the Court concluded, the termination provision in California's § 418 Agreement did not rise to the level of property because it could not be viewed "as conferring any sort of 'vested right' in the face of precedent concerning the effect of Congress' reserved power on agreements entered into under a statute containing the language of reservation." *Id.*

The holding in *Bowen* rests upon the fact that, when Congress established the Social Security System, it reserved the right to change the System. We thus agree with the Claims Court that "*Bowen* stands for the proposition that enforceable rights sufficient to support a taking claim against the United States cannot arise in an area voluntarily entered into and one which, from the start, is subject to pervasive Government control." 26 Cl. Ct. at 5 (citation omitted). The reason "enforceable rights sufficient to support a taking claim" cannot arise in such an area is that when a citizen voluntarily enters such an area, the citizen cannot be said to possess "the right to *exclude*". *Hendler*, 952 F.2d at 1374. And the reason the citizen cannot be said to possess "the right to

exclude" is that the citizen is in an area subject to government control. Mitchell voluntarily entered the firearms import business, thereby knowingly placing itself in the governmentally controlled arena of firearms importation under the Gun Control Act, just as California, by entering into a § 418 Agreement, knowingly placed itself in the governmentally controlled arena of the Social Security System. Under these circumstances, Mitchell's expectation of selling the assault rifles in the United States — which expectation necessarily flowed from the ATF permits — could not be said to be a property right protected under the Fifth Amendment.

We view this case as analogous to the situation in *Allied-General Nuclear Services v. United States*, 839 F.2d 1572 (Fed. Cir.), *cert. denied*, 488 U.S. 819 (1988). There, the plaintiff alleged a taking based upon the government's denial of a permit to operate a plutonium recycling plant. The government actively promoted and induced the plaintiff's expenditure of over $200 million to build the plant. Upon the plant's completion, however, the government, having reconsidered its policy regarding nuclear proliferation, refused to issue the expected operating permit, thereby rendering the plaintiff's investment useless. This court affirmed the Claims Court's finding that no compensable taking had occurred, stating that "the basic rule that is dispositive here is that as against reasonable state regulation, no one has a legally protected right to use property in a manner that is injurious to the safety of the general public." *Id.* at 1576. Just as Allied General's expectation of operating the plutonium recycling plant was found not to be a property right protected by the Fifth Amendment because it was subject to governmental regulation of nuclear facilities, so too Mitchell's expectation of selling its assault rifles in the United States was not such a property right because it was subject to governmental regulation of firearms importation under the Gun Control Act.

Mitchell contends that its interest arising from the permits is analogous to the possessory leasehold interests held in Indian lands by the plaintiffs in *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990), and *NRG Co. v. United States*, 34 Cl. Ct. 51 (1991). We disagree.

"[T]he Fifth Amendment concerns itself solely with the 'property,' i.e., with the owner's relation as such to the physical thing and not with other collateral interests which may be incident to his ownership." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). In revoking the permits, ATF withdrew its prior authorization for Mitchell to sell certain types of assault rifles in the United States. Otherwise, Mitchell retained complete control over the rifles. Mitchell could have done anything it wished with the rifles, except import them into the United States in their original configuration. Put another way, ATF did not take the rifles. Rather, it "took" from Mitchell the ability to realize an expectation in the ultimate market disposition of the rifles. This "collateral interest" incident to Mitchell's ownership of the rifles is not property protected by the Fifth Amendment. As the Claims Court stated:

> In this case, the interest affected by ATF's actions — the right to sell assault weapons in domestic commerce — is not a right inherent in plaintiff's ownership of those weapons. That right comes into being only upon the issuance of an import permit. Since however, it is the Congress alone which has the power to regulate commerce with foreign nations, plaintiff does not have an enforceable right to the issuance of an import license. For that same reason then, plaintiff has no basis on which to found a taking claim.

26 Cl. Ct. at 6.

As the Claims Court recognized, in both *United Nuclear* and *NRG*, "[t]he interest affected — the right to mine — was inherent in the ownership rights that United Nuclear and NRG held *independent* of their denied permits." 26 Cl. Ct. at 6. By contrast, as just noted, Mitchell's expectation of selling the assault rifles in domestic commerce — the interest affected in this case — was not inherent in its ownership of the rifles. Rather, it was totally *dependent* upon the import permits issued by ATF. In short, Mitchell's ability to import the rifles and sell them in the United States was at all times entirely subject to the exercise of ATF's regulatory power. Consequently, any expectation which arose on Mitchell's part as a result of the import permits did not constitute a property right protected by the Fifth Amendment.

CONCLUSION

Mitchell has failed to realize the revenues it anticipated when it contracted with the Directorate to purchase assault rifles. However, the frustration of Mitchell's financial expectations by the unforeseen revocation of the import permits did not amount to the taking of a property right protected by the Fifth Amendment. We thus affirm the judgment of the Claims Court dismissing Mitchell's complaint for failure to state a claim upon which relief could be granted.[3]

AFFIRMED

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[3]Our holding with respect to Mitchell's claim based upon the revocation of the import permits for the assault rifles compels a similar result in the case of Mitchell's claim based upon the 90-day suspension of the import permits for the .22 caliber semiautomatic rimfire rifles.

APPENDIX

APPENDIX

PART B. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

TITLE 5 UNITED STATES CODE, SECTION 553, SUBDIVISIONS (c) AND (d)

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except —

(1) A substantive rule which grants or recognizes an exemption or relieves a restriction.

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

TITLE 18 UNITED STATES CODE, SECTION 925, SUBDIVISION (d)(3)

(d) The Secretary shall authorize a firearm or ammunition to be imported or brought into the United States or any possession thereof if the firearm or ammunition —

* * *

(3) is of a type that does not fall within the definition of a firearm as defined in section 5845(a) of the Internal Revenue Code of 1954 and is generally recognized as particularly suitable for or readily adaptable to sporting purposes, excluding surplus military firearms, except in any case where the Secretary has not authorized the importation of the firearm pursuant to this paragraph, it shall be unlawful to import any frame, receiver, or barrel of such firearm which would be prohibited if assembled . . .

TITLE 18, UNITED STATES CODE, SECTION 926, SUBDIVISIONS (a) AND (b)

(a) The Secretary may prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter, including —

(1) regulations providing that a person licensed under this chapter, when dealing with another person so licensed, shall provide such other licensed person a certified copy of this license; and

(2) regulations providing for the issuance, at a reasonable cost, to a person licensed under this chapter, of certified copies of his license for use as provided under regulations issued under paragraph (1) of this subsection. No such rule or regulation prescribed after the date of the enactment of the Firearms Owners' Protection Act may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision

PUBLISHER'S NOTE:

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